

1993

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Recommended Citation

Glynn, Timothy P., "Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute" (1993). *Minnesota Law Review*. 2445.

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Note

The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute

Timothy P. Glynn

The debate over transracial adoption and race-matching policies is a battle between fundamental values: racial autonomy versus racial integration; group consciousness and identity versus nuclear family interests and integrity.¹ The adoption context heightens the importance of these conflicts because it affects the futures of thousands of children.² Social workers,

1. See generally JOYCE A. LADNER, *MIXED FAMILIES* 72-101 (1977) (detailing the deeply held values and interests that conflict in the transracial adoption context).

2. The controversy surrounding transracial adoption primarily concerns white parents attempting to adopt minority children. For example, one survey found only four cases nationwide in which black families had adopted white children. DAWN DAY, *THE ADOPTION OF BLACK CHILDREN* 99 (1979). Thus, most of the discussion and statistics relating to transracial adoption concern minority child placements.

The number of children already adopted, waiting for adoption, or in foster care is unknown because the United States government stopped gathering national adoption data in 1975. RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTees AND THEIR FAMILIES* 4, 6 (1987). Estimates place the number of total out-of-home placements of children in 1989 at approximately 360,000. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1173-74 n.10 (1991). Additional studies indicate half of the children in these placements are minorities. *Id.* In 1983, up to 40,000 black children awaited an adoption placement. SIMON & ALTSTEIN, *supra*, at 5. In 1984, approximately 68,000 white couples wanted to adopt transracially. *Id.* at 6.

This Note focuses on non-Native American transracial adoption placements and the constitutional standards applicable to state and agency race-matching policies. This Note does not discuss the transracial adoption of Native American children because the Indian Child Welfare Act (ICWA) often governs these placements. See 25 U.S.C. §§ 1901-1963 (1982). While the ICWA contains a race-matching provision, the issues involved in adopting Native American children differ fundamentally from other transracial adoptions because of Congress's power to address Indian questions and Indian tribes' sovereignty and jurisdiction. For an analysis of the ICWA, see Margaret Howard, *Transracial Adoption: An Analysis of the Best Interests Standard*, 59 NOTRE

psychologists, and policy makers have failed to reach a consensus on this issue.³ They are not alone. Confronting these competing principles and extremely high stakes, courts continue to struggle with how race should inform adoption decisions. Minnesota is one of several states that have enacted a statutory preference for same-race adoption placements.⁴

Because the Supreme Court has not confronted the constitutionality of such laws directly, their status remains uncertain.⁵ This uncertainty, combined with ambiguous statutory language and the controversy surrounding the issue, places a heavy burden on lower courts attempting to apply and weigh racial factors in adoption proceedings. These courts need clear constitutional standards and an analytical guide to better serve the interests of the many children their decisions affect.

The purpose of this Note is to clarify the current state of the law by critiquing the constitutionality of the Minnesota

DAME L. REV. 503, 522-27 (1984); Estar C. Kim, *Mississippi Band of Choctow Indians v. Holyfield: The Contemplation of All, the Best Interests of None*, 43 RUTGERS L. REV. 761, 768-772 (1991).

3. See, e.g., LADNER, *supra* note 1, at 72-101 (outlining sharp disagreements among professionals and others over the effect and value of transracial adoption).

4. The Supreme Court has held that race may never be a factor in custody disputes between a child's natural parents. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This case, however, is probably not controlling in the adoption and foster care contexts. See *infra* notes 30-33 and accompanying text (discussing how courts have limited *Palmore's* application to custody disputes).

5. Minnesota's race-matching provision is an appropriate focus because this state has played a key role in the history of, and controversy surrounding, transracial adoption. The earliest recorded transracial adoption (of a black child) occurred in Minnesota in 1948. LADNER, *supra* note 1, at 59. Minnesota adoption agencies led the way in experimenting with transracial adoption on a larger scale in the early 1960s. DAY, *supra* note 2, at 94. Minnesota organizations, Parents to Adopt Minority Children (PAMY) and the Open Door Society of Minnesota, were among the first coordinated groups of families of transracial adoptees. *Id.* at 93; RITA J. SIMON & HOWARD ALTSTEIN, *TRANS-RACIAL ADOPTION* 29 (1977). Several major transracial adoption studies have focused on Minnesota because of the substantial number of such adoptions in this area. See, e.g., LUCILLE J. GROW & DEBORAH SHAPIRO, *BLACK CHILDREN—WHITE PARENTS* 9 (1974); LADNER, *supra* note 1, at 61.

Today, Minnesota remains embroiled in the battle over transracial adoption. For example, Minnesota's recent "Baby D" case, involving an adoption dispute between the child's white foster parents and black grandparents, received national publicity. See *In re D.L.*, 479 N.W.2d 408 (Minn. Ct. App. 1991), *aff'd*, 486 N.W.2d 375 (Minn.), *cert. denied*, 113 S. Ct. 603 (1992). In addition, a recent *60 Minutes* episode featuring the transracial adoption controversy focused on Minnesota's race-matching policies and the anti-interracial adoption views of several Hennepin County (Minnesota) social workers. *60 Minutes* (CBS television broadcast, Oct. 25, 1992).

same-race preference statute. Part I summarizes the legal history of transracial adoption, Minnesota's preference statute and adoption law, and the constitutional principles governing the courts' use of race in adoption proceedings.⁶ Part II critiques the Minnesota statute and proposes an analytical framework to ensure courts apply racial factors in a constitutional manner. This Note concludes that while the statute is not invalid on its face, it may be unconstitutional as applied. The Minnesota same-race preference statute and other similar laws can withstand constitutional scrutiny, however, if courts apply them in accordance with the methodology this Note proposes.

I. THE LEGAL HISTORY AND BACKGROUND OF RACE-MATCHING IN ADOPTION

Courts play a central role in the transracial adoption controversy. Because they have final authority to determine the best interests of adoptive children, courts bear the responsibility of interpreting and applying same-race preference provisions such as the Minnesota statute. These race-matching policies create a difficult dilemma for the judiciary. While consideration of race arouses suspicion whenever it is a part of any judicial or legislative equation, its use in the adoption and foster care contexts is well-established and perhaps necessary.⁷ Although the Supreme Court has never confronted the issue, lower courts have drawn two bright lines in this area. States, courts and agencies may not ban interracial adoption nor utilize race as an independently decisive factor. Yet courts may consider race as one factor among others in adoption decisions. Between these two poles, however, courts have not defined the appropriate use of race in the adoption calculus.

A. THE HISTORY OF TRANSRACIAL ADOPTION AND THE COURTS

Transracial adoption is a relatively new phenomenon.⁸

6. See, e.g., *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978) ("We conclude, as did another court which grappled with the problem, that the difficulties inherent to interracial adoption justify consideration of race as a relevant factor in adoptions.") (citing *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972)).

7. See *infra* notes 64-73 and accompanying text.

8. For a detailed social, political and cultural history of transracial adoption, see LADNER, *supra* note 1, at 56-72; DAY, *supra* note 2, at 89-100; SIMON & ALTSTEIN, *supra* note 5, at 9-22; Bartholet, *supra* note 2, at 1174-82..

The civil rights movement of the 1950s and 1960s began to erode the strict barriers between the races. An upsurge in adoption activity across racial lines accompanied this new openness.⁹ Reformers and policy makers began to promote transracial adoption as they did other forms of social integration.¹⁰ By the late 1960s and early 1970s, thousands of transracial adoptions took place annually.¹¹

Shortly thereafter, however, the number of white families adopting black children declined as strong criticism of transracial adoption emerged.¹² The National Association of Black Social Workers, the most influential critic, vehemently opposed all interracial adoptions of black children, arguing these placements irreparably injure the children and the black community.¹³ Although transracial adoption proponents pointed to contrary empirical data and to the need for permanent homes for minority children,¹⁴ many agencies began to apply more

9. LADNER, *supra* note 1, at 68-69. Other factors such as increasing demand for adoptive children and a decline in the white birth rate also may have contributed to this growth. *Id.* at 62, 69.

10. See DAY, *supra* note 2, at 97. By 1968, the Child Welfare League of America was "cautiously encouraging" transracial adoption. *Id.* (citing CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE (1968)).

11. In 1969, over one thousand black children were placed with white families nationwide. *Id.* at 93. The number of such placements peaked at 2574 in 1971, according to a national survey of 468 adoption agencies. *Id.*

12. *Id.* By 1975, even with 565 adoption agencies participating in the survey, the number of black placements with white families fell to 831. *Id.*

13. The National Association of Black Social Workers (NABSW) began its crusade against transracial adoption with the release of a position statement in 1972. See LADNER, *supra* note 1, at 74-75. The statement declared:

Black children should be placed only with Black families whether in foster care or for adoption. Black Children belong physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop . . . their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.

Id. (citing NABSW Position Statement on Transracial Adoptions (Sept. 1972)).

The NABSW stance on adoption remains firm; more recently, the NABSW President labelled transracial placements "race and cultural genocide." SIMON & ALTSTEIN, *supra* note 2, at 143 n.1 (quoting testimony by NABSW President William T. Merritt before the Senate Committee on Labor and Human Resources (June, 1985)). The Children's Welfare League of America has followed the NABSW's lead, adding a racial preference to its standards. See DAY, *supra* note 2, at 98.

14. Proponents of transracial adoption argue that race-matching policies hurt minority children because the children are left in temporary foster and institutional care settings. See, e.g., Bartholet, *supra* note 2, at 1201-07 (discussing the impact of "holding policies" that leave minority children in temporary care for longer periods of time). Nearly all authorities agree that permanent placement is not only preferable, but also crucial to promoting a

strict race-matching policies.¹⁵ Today, several states, including Minnesota, have built same-race preferences into adoption statutes.¹⁶

Because our system vests courts with final authority in adoption decisions, they are inextricably linked to this short history of transracial adoption.¹⁷ The Supreme Court began to reduce segregation in the family law context by holding anti-miscegenation laws unconstitutional in *Loving v. Virginia*.¹⁸

child's well-being. *Id.* at 1223-25; see SIMON & ALTSTEIN, *supra* note 2, at 142; Howard, *supra* note 2, at 507-08.

Many opponents of transracial adoption argue, however, that the shortage of permanent black homes is a myth adoption agencies have created because of their inability to recruit qualified black families and biased agency standards. See LADNER, *supra* note 1, at 76. Opponents also contend that, while permanent placements are preferable, most black children in the foster care system are older and have special needs and that there is little white demand for such children. SIMON & ALTSTEIN, *supra* note 2, at 143 n.1.

Empirical studies suggest that transracial adoption does not cause psychological or emotional harm to the child. *Id.* at 3. "To this date, no data have been presented that support the belief that in the long run [transracial adoption] is detrimental to those involved . . ." *Id.* On the contrary, the research indicates transracial adoption creates some positive results. *Id.* Simon's and Altstein's study ultimately concluded that cross-racial adoption has no significant effect on a child's self-esteem. *Id.* at 112.

Opponents of transracial adoption counter that these studies are unreliable and inconclusive. Specifically, they argue that the data is biased because "success" is difficult to define and is probably based on white middle-class criteria. See, e.g. GROW & SHAPIRO, *supra* note 5, at 89-91; Bartholet, *supra* note 2, at 1208; Howard, *supra* note 2, at 534 n.155. In addition, these studies do not extend into late adolescence and adulthood, drawing an incomplete picture. Howard, *supra* note 2, at 249. The NABSW and others also continue to insist that transracially adopted black children suffer from a loss of racial and cultural identity. See, e.g., SIMON & ALTSTEIN, *supra* note 2, at 143 n.1 (stating the NABSW position that black children in white homes will emerge with identity problems and will not develop "coping mechanisms" for combating society's racism). One study suggests transracial adoptees may lack a positive racial identity. Howard, *supra* note 2, at 538 n.177.

All sides agree that agencies and courts should place children in same-race homes, if available and absent other qualifying factors. DAY, *supra* note 2, at 91; SIMON & ALTSTEIN, *supra* note 2, at 142; Bartholet, *supra* note 2, at 1243.

15. See Bartholet, *supra* note 2, at 1181, 1183-85 (outlining how most adoption agencies have implemented race-matching policies, including some *de facto* bans on transracial adoption).

16. See ARK. CODE ANN. § 9-9-102 (Michie 1987); MINN. STAT. § 259.58, subd. 2 (1992); see also Bartholet, *supra* note 2, at 1189 (listing states that mandate use of race as a factor in adoption proceedings).

17. See, e.g., SIMON & ALTSTEIN, *supra* note 5, at 17-21 (discussing the importance of courts in the history of transracial adoption).

18. 388 U.S. 1, 2 (1967) (stating statutes prohibiting marriages between persons "solely on the basis of racial classifications" violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

As the debate over the role of race in adoption goes on, the principle battles will continue to be fought in the courtroom. Same-race preference statutes, such as Minnesota's, will ultimately need to withstand judicial scrutiny.¹⁹

B. THE MINNESOTA STATUTE AND THE BEST INTEREST STANDARD

The Minnesota Minority Heritage Protection Act, in relevant part, is codified as follows:

Subd. 2. Protection of heritage or background. The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due consideration of the child's race or ethnic heritage in adoption placements

In reviewing adoptive placement, the court shall consider preference . . . in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detrimental to the child, or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child or if that is not feasible, to (c) a family of different racial or ethnic heritage from the child that is knowledgeable and appreciative of the child's racial or ethnic heritage.²⁰

The Minnesota Department of Human Resources Rules echo this provision and even classify minority children as a "special needs" category.²¹ The Department's adoption workers' handbook, used by state and county social services workers, emphasizes same-race preferences as well.²²

19. Agencies traditionally have had great influence over adoption decisions; courts have often deferred to their findings. SIMON & ALTSTEIN, *supra* note 5, at 17-18. Courts, however, hold final and ultimate authority over adoption decisions. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICES 85 (1988) [hereinafter CWLA STANDARDS]. "It is the responsibility of the court to see that all aspects of the law have been followed and also to protect the best interests of the child." *Id.*

20. MINN. STAT. § 259.28, subd. 2 (1992); *see also id.* § 259.255 (containing identical language). It is now somewhat of a misnomer to refer to the statute as the Minority Heritage Protection Act. Minnesota amended the statute in 1992, removing references to a child's "minority" racial or ethnic heritage. *See* MINN. STAT. ANN. § 259.28, at 670 (West 1992). This amendment followed a Minnesota appeals court opinion declaring the statute unconstitutional because it applied only to minority children. *In re D.L.*, 479 N.W.2d 408, 413 (Minn. Ct. App. 1991), *aff'd on other grounds*, 486 N.W.2d 375 (Minn.), *cert. denied*, 113 S. Ct. 603 (1992). Neither Minnesota court reached the issue of the constitutionality of the "preference" itself.

An additional statutory provision requires each authorized placement agency to attempt to recruit families of the same racial or ethnic background as the adoptive child. MINN. STAT. § 259.455 (1992).

21. MINN. R. 9560.0040, subp. 2 (1992). The rule includes a provision requiring placement in accordance with the statutory preference. *Id.*

22. MINNESOTA DEP'T OF HUMAN SERVS. ADOPTION UNIT, HANDBOOK FOR WORKERS IN ADOPTION 3 (1992) [hereinafter ADOPTION HANDBOOK]. Several

The standard of acting in the "best interest of children" codifies a general principle courts apply in all jurisdictions.²³ The standard directs trial judges to make the child's welfare paramount when they review adoption agency recommendations and balance factors.²⁴ The best interest rubric contains no set balancing formula; the balancing and weighing of pertinent factors will vary from case to case depending upon the quality of and interrelationships between these factors.²⁵ The standard therefore affords trial judges broad discretion in determining whether placement in a particular home will best promote a child's welfare;²⁶ appellate courts will only overturn trial court decisions for an abuse of this discretion.²⁷ Moreover, because

model forms require a listing or recording of race. See, e.g., *id.* at ch. 2, app. at 3 (Adoption Review Team Draft).

23. MINN. STAT. § 259.28, subd. 1 (1992); *In re D.L.*, 486 N.W.2d at 379; *In re Jordet*, 80 N.W.2d 642, 646 (Minn. 1957); see also *Compos v. McKeithen*, 341 F. Supp. 264, 267 (E.D.La. 1972). "In all jurisdictions the welfare and best interests of the child are paramount in both adoption and custody proceedings." *Id.*

24. *In re D.L.*, 486 N.W.2d at 379; *In re Jordet*, 80 N.W.2d at 647; see also *DeWees v. Stevenson*, 779 F. Supp. 25, 29 (E.D. Pa 1991) (stating the best interest of the child always takes precedent over other considerations). In *Palmore v. Sidoti*, a child custody case, the Supreme Court applied the "best interest" standard, noting Florida law requires it "[i]n common with most states." 466 U.S. 429, 433 (1984). For a general discussion of the best interest calculus and its prominence in adoption proceedings, see 2 C.J.S. *Adoption* §§ 89-91 (1972) and 2 AM. JUR. 2D *Adoption* § 61 (1962).

25. See *In re D.I.S.*, 494 A.2d 1316, 1323-24 (D.C. 1985). The balancing formula cannot be precise or rigid; it must be flexible enough to address the best interest of each individual child. *Id.* In adoption proceedings, the court weighs many relevant factors to determine which family will best promote a child's welfare. See, e.g., Eileen M. Blackwood, Note, *Race as a Factor in Custody and Adoption Disputes: Palmore v. Sidoti*, 71 CORNELL L. REV. 209, 213 (1985). Most states take into account factors such as stability of the adoptive home environment, and the adoptive family's financial status, lifestyle and health. *Id.* at 213-15. The weight and application of the factors varies. See *id.*

Because "best interest" is so vague, the test has received substantial criticism. See, e.g., Howard, *supra* note 2, at 527-45 (outlining competing interests besides the child's welfare that impact judicial and agency decisions); Laura J. Schwartz, *Religious Matching for Adoption: Unravelling the Interests Behind the "Best Interests" Standard*, 25 FAM. L. Q. 171, 171-72 (1991) (arguing the standard is unclear, inaccurate and may favor goals other than the child's true best interest).

26. *In re Jordet*, 80 N.W.2d at 646. The trial judge may make a determination based on "all relevant factors" and no impermissible ones. *In re R.M.G.*, 454 A.2d 776, 790 (D.C. 1982).

27. *In re R.M.G.*, 454 A.2d at 790. See *In re D.L.*, 486 N.W.2d at 381; *In re Moorehead*, 600 N.E.2d 778, 784-85 (Ohio Ct. App. 1991). But see *In re Davis*, 465 A.2d 614, 618-19 (Pa. 1983) (differing from other opinions by defining the scope of appellate review as granting little deference to the trial judge's findings). "An 'abuse of discretion' is defined as more than an error of law or

statutory preferences are subordinate to the best interest principle, a judge must only "substantially comply" with such laws in making an adoption determination.²⁸

C. THE CONSTITUTIONALITY OF USING RACE IN ADOPTION DECISIONS

1. Lack of Supreme Court Precedent

The Supreme Court has never specifically addressed courts' use of racial factors in adoption decisions. In *Palmore v. Sidoti*, the Court considered an analogous question in the context of custody proceedings, holding that a state may never use race to remove "an infant child from the custody of its natural mother found to be an appropriate person to have such custody."²⁹

While *Palmore* might appear to constrain trial judges' use of race in placement determinations, courts have limited its application to custody disputes and have refused to extend it to the adoption and foster care areas. For example, in *J.H.H. v. O'Hara*, the Eighth Circuit concluded that *Palmore's* holding established only that race cannot be the determining factor in custody proceedings and did not exclude the use of race in foster care and adoption placement decisions.³⁰ At most, the Eighth Circuit declared, *Palmore* reaffirms that race "may not be the sole factor in determining the best interests of the child."³¹ In addition, the Supreme Court's language in *Palmore* supports a narrow reading of its holding. The language does

judgment. It is an unreasonable, arbitrary or unconscionable attitude of a court." *In re Moorehead*, 600 N.E.2d at 785 (citing *State v. Adams*, 404 N.E.2d 144, 148 (Ohio 1980)).

Some commentators now perceive wide judicial discretion as harmful and dangerous when race is a factor, especially given the vagueness of the best interest standard. See, e.g., Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 59-60 (1990-91) (suggesting the best interest rule, combined with broad judicial discretion, allows for biased assumptions and inappropriate dominance of racial considerations).

28. See *In re Jordet*, 80 N.W.2d at 646. "Adoption statutes are to be liberally construed to accomplish their purpose, and there need not be more than a substantial compliance with their requirements to sustain validity of adoption proceedings." *Id.*

29. 466 U.S. 429, 434 (1984). The mother and father in *Palmore* were white, but the mother lived with a black man whom she later married. *Id.* at 430-31. The Court reasoned that even though racial bias and prejudice might make life difficult at times for a child raised in a bi-racial household, societal failings do not justify a racially based custody decision. *Id.* at 433.

30. 878 F.2d 240, 245 (8th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990).

31. *Id.*

not implicate adoption placements, but refers only to the removal of a child from the "natural mother" for reasons of race.³² Furthermore, many other courts recently confronting the issue of race in adoption and foster care proceedings, whether ultimately affirming or rejecting racial factors in the given context, have reasoned to their conclusions without relying on *Palmore*.³³ Thus, most jurisdictions do not view the restrictive *Palmore* language as extending to adoption and foster care decisions.

2. Constitutionally Impermissible Uses of Race

Lower courts have established that statutory bans on transracial adoption violate the Fourteenth Amendment of the Constitution.³⁴ Such statutes are facially void.³⁵ No justification overrides the constitutional deprivation a blanket restriction on

32. *Palmore*, 466 U.S. at 433. "The question however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for the removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not." *Id.* See generally Robert B. Weinstock, Note, *Palmore v. Sidoti: Color Blind Custody*, 34 AM. U. L. REV. 245 (1984-85) (analyzing *Palmore's* effect and concluding the holding is intentionally narrow and should not affect adoption proceedings).

33. See, e.g., *DeWees v. Stevenson*, 779 F. Supp. 25 (E.D. Pa. 1991); *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3rd Cir. 1989); *In re D.I.S.*, 494 A.2d 1316 (D.C. 1985).

34. *In re Gomez*, 424 S.W.2d 656, 658 (Tex. Ct. App. 1967) (per curiam). The court flatly struck down a Texas adoption statute which read "No white child can be adopted by a negro person, nor can a negro child be adopted by a white person." *Id.* at 657-59; see also *Compos v. McKeithen*, 341 F. Supp. 264, 266-67 (E.D. La. 1972) (striking down a Louisiana statute prohibiting transracial adoption).

The Fourteenth Amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. *In re Gomez* articulated the stringent requirements the Equal Protection Clause imposes on racial classifications:

At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," . . . and, if they are ever to be upheld, they must be shown to be necessary to accomplish some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

424 S.W.2d at 659 (citation omitted) (quoting *Loving v. Virginia*, 388 U.S. 1, 8 (1967)).

35. See *Compos*, 341 F. Supp. at 266-67. Laws banning transracial adoption are void by their language because they compel courts to use race decisively in

interracial adoption causes.³⁶ Prohibitions on cross-race adoptions are invalid even though they treat all races equally.³⁷ In addition, a law or policy designed only to prevent white families from adopting minority children also fails equal protection analysis.³⁸

Facially neutral laws or policies which courts and administrative bodies apply in a manner that makes race automatically determinative are also unconstitutional.³⁹ In *In re Adoption of a Minor*, the Court of Appeals for the District of Columbia held that race alone can never be the sole, independently decisive factor in formulating which adoptive family would best promote a child's welfare.⁴⁰ A court or administrator may not "ignore all other relevant considerations."⁴¹ Moreover, when decision makers take a variety of factors into account, race may not "overweigh" the rest of the field.⁴² An Ohio appellate court recently expanded the *In re Adoption of a Minor* principle, holding a trial judge abused his discretion by deferring to an

every instance, and race alone cannot automatically subordinate all other interests. *Id.*

36. *See id.* The *Compos* court reasoned that the advantages of same-race adoption cannot, in all cases, outweigh the advantages of interracial adoption. Thus, the Louisiana statute banning transracial adoptions did not withstand scrutiny. *Id.*

37. *See* *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"); *In re Gomez*, 424 S.W.2d at 658-59.

38. *See, e.g.,* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 293 (1978) (Powell, J.) (stating the drafters framed the Fourteenth Amendment in neutral terms and it therefore applies to all races equally). This notion of equal application is important in interracial adoption because the vast majority of the controversy surrounds restrictions on white families adopting minority children and not vice versa. Bartholet, *supra* note 2, at 1174-75 (stating the controversy primarily focuses on the adoption of black children). Non-whites rarely adopt white children. DAY, *supra* note 2, at 99.

39. *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. Cir. 1955). The Supreme Court established the general principle that the application of a statute, rule or policy must also meet constitutional muster in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

40. *In re Adoption of a Minor*, 228 F.2d at 448; *see also* *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1204-05 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978); *McLaughlin v. Pernsley*, 693 F. Supp. 318, 324 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3rd Cir. 1989); *In re R.M.G.*, 454 A.2d 776, 786 (D.C. 1982); *Fontaine v. Fontaine*, 133 N.E.2d 532, 534-35 (Ill. Ct. App. 1956); *In re Davis*, 465 A.2d 614, 626 (Pa. 1983).

41. *In re Adoption of a Minor*, 228 F.2d at 448.

42. *Compos v. McKeithen*, 341 F. Supp. 264, 267 (E.D. La. 1972).

agency that had used race as the determinative factor.⁴³ Thus, the use of race as the single or controlling factor at any level of the adoption inquiry violates the Equal Protection Clause.⁴⁴

3. Constitutionally Permissible Uses of Race

Courts may use race, however, as one factor among others in the adoption placement calculus. Many states have laws requiring adoptive parents to report their race or incorporating racial criteria into their adoption formulas.⁴⁵ Courts have consistently upheld the relevance and importance of race in the placement process, provided race does not receive undue emphasis.⁴⁶ In fact, some jurisdictions have concluded that race is a factor that should and must be a part of any adoption inquiry.⁴⁷ While the use of race in statutes and judicial determi-

43. *In re Moorehead*, 600 N.E.2d 778, 787 (Ohio Ct. App. 1991). The court found that the Montgomery Children's Service Board's policy, which allowed only black couples to adopt black children, violated the Fourteenth Amendment. *Id.* The court then concluded that the trial judge erred by deferring to a public agency employing an unconstitutional policy. *Id.*

44. For further discussion of race as the sole or independently decisive factor in adoption decisions, see Howard, *supra* note 2, at 511 n.34 (listing cases barring the use of race as the sole determinative factor in adoption placements); and Jay M. Zitter, Annotation, *Race as a Factor in Adoption Proceedings*, 34 A.L.R. 4TH 167, 170 (1986) (summarizing the use of race in adoption proceedings).

States, courts and agencies may not separate children of different races into adoptive pools with different adoptive criteria and timelines. Such automatically determinative classifications, aimed solely at reserving children for same-race parents, violate equal protection principles. See Bartholet, *supra* note 2, at 1193-95 (discussing state "holding" policies for minority children), 1237 (stating such policies run counter to the role of legitimate affirmative action policies), 1241 (asserting courts can no longer ignore absolute policies of agencies), 1248 (concluding no delay in placement should be tolerated "in the interest of ensuring a racial match").

The Supreme Court has found such two-tiered systems unconstitutional in other contexts. In *Regents of University of California v. Bakke*, the Court rejected the use of completely separate "pools" for medical school applicants of different races, determining such a blanket division is not necessary to serve the university's interest in promoting diversity. 438 U.S. 265, 315 (1978) (Opinion of Powell, J.).

45. See, e.g., ARK. CODE ANN. § 9-9-102 (Michie 1987); MINN. STAT. § 259.28, subd. 2 (1992); Bartholet, *supra* note 2, at 1189 (listing states that mandate the use of race as a factor in adoption proceedings); D. Michael Reilly, Comment, *Constitutional Law: Race as a Factor in Interracial Adoptions*, 32 CATH. U. L. REV. 1022, 1023 (1984) (naming six states that require a statement of the parents' race on the adoption application form); see also *supra* note 20, and accompanying text (setting forth the Minnesota statute).

46. *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

47. See, e.g., *In re Adoption of Baker*, 185 N.E.2d 51, 53 (Ohio Ct. App.

nations is immediately suspect, courts have articulated two distinct lines of reasoning to support the constitutionality of considering race in the adoption calculus.

Drummond v. Fulton County Department of Family and Children's Services outlines the first of these approaches.⁴⁸ In *Drummond*, the Fifth Circuit upheld the lower court's use of race as a factor in an adoption proceeding because it did not further a discriminatory end.⁴⁹ Rather, the trial judge took race into account for the sole purpose of determining the best interest of the child.⁵⁰ The Fifth Circuit drew upon the Supreme Court's reasoning in *United Jewish Organizations v. Carey*, which upheld New York's use of race in reapportioning voting districts solely to promote fair representation.⁵¹ Applying *United Jewish Organizations* to the adoption context, the Fifth Circuit concluded that because the adoption agency considered race only to promote the child's welfare, its decision created no "racial slur or stigma with respect to whites or any other race."⁵² Thus, the agency's use of race did not violate the Fourteenth Amendment.⁵³

Drummond established in adoption jurisprudence the principle that decisions lacking invidious intent do not offend the Equal Protection Clause.⁵⁴ Although a law or policy banning

1962) ("Under ordinary circumstances a child should be placed in a family having the same racial, religious and cultural backgrounds . . ."); cf. *In re Davis*, 465 A.2d 614, 622-25 (Pa. 1983) (holding the lower court's failure to acknowledge race was erroneous but harmless); *Drummond*, 563 F.2d at 1205 (stressing the importance of considering race in placement decisions); see also Bartholet, *supra* note 2, at 1243 (stating professionals, with "near-unanimity" agree that "black children should be raised by black parents if this is at all possible").

48. 563 F.2d 1200 (5th Cir. 1977), *cert denied*, 437 U.S. 910 (1978).

49. *Id.* at 1205.

50. *Id.*

51. 430 U.S. 144 (1977). The Court held that a King's County, New York reapportionment plan that purposefully gerrymandered voting districts to better reflect racial groups did not violate the Fourteenth Amendment because the planners had no invidious intent. *Id.* at 165.

52. *Drummond*, 563 F.2d at 1205 (quoting *United Jewish Organizations*, 430 U.S. at 165). Race is permissible as one factor if used for the sole purpose of serving the child's best interest. *Id.*

53. *Id.*

54. *Id.* While *Drummond* uses the language of the Supreme Court in *United Jewish Organizations* to support this proposition, later Supreme Court decisions have not ratified the *United Jewish Organizations* approach to facially discriminatory racial classifications. In *Washington v. Davis*, the Supreme Court held that a plaintiff must show discriminatory intent to demonstrate an equal protection violation. 426 U.S. 229, 242 (1976). *Washington v. Davis*, however, involved a facially neutral classification. *Id.*; see also *Village of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 265-67 (1977)

interracial adoption is unconstitutional because the state has created a classification based solely on race, use of race as a "mere factor" in adoption decisions is constitutional because the only aim is to serve the child's best interest.⁵⁵

While courts and commentators often view *Drummond* as the principle transracial adoption case, its approach has lost favor in the adoption jurisprudence and other realms of constitutional inquiry. More recent Supreme Court cases, principally *Regents of University of California v. Bakke*, suggest that any intentional use of racial factors in state evaluative or decision-making processes, whether for invidious or benign purposes, requires the strictest constitutional scrutiny.⁵⁶

A few courts have continued to take the *Drummond* approach to interracial adoption even after *Bakke*.⁵⁷ Others have redefined their use of racial factors in adoption determinations to better conform to *Bakke*. In *In re R.M.G.*, the District of Columbia Court of Appeals seemed to reject the *Drummond* prin-

(stating the opponent bears the burden of showing discriminatory intent motivated a state actor's decision under a facially neutral state policy or law; impact, whether disproportionate or not, cannot alone prove invidious intent). Later, in the affirmative action context, the Supreme Court held that a facially discriminatory set-aside program must receive strict scrutiny even if not motivated by invidious intent. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). The Court has not addressed this issue in the adoption area.

55. *Drummond*, 563 F.2d at 1205 ("There has been no suggestion . . . that the defendants had any purposes other than to act in the best interest of the child when [considering] race."). In other words, a statute or court cannot ban interracial adoption or use race as the sole determinant because this does not serve a child's best interest. Considerations other than race must play a role in the decision if a child's welfare is truly top priority. *See id.* Thus, use of race as the sole and independently decisive factor indicates the decisionmaker's goal must be to classify or discriminate. *Id.*

56. 438 U.S. 265, 291 (1978) (Powell, J.). *Bakke* has no majority opinion, but Powell's compromise approach represents the decision of the Court. Powell stated "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* Rejecting the *United Jewish Organizations* approach, *Bakke* stated that even "benign" discrimination must meet such standards. *Id.* at 294. Powell went on to state, however, that "diversity" at a university constitutes a compelling (or at least substantial) state interest and that the use of race as a single factor in admissions decisions is a precisely tailored means of achieving this end. *Id.* at 313-15, 317-18. Thus, admissions plans promoting diversity by using race as one factor among many survive strict scrutiny and are constitutionally acceptable. *Id.*

57. *See, e.g., In re D.I.S.*, 494 A.2d 1316, 1327 (D.C. 1985). The court held that a lower court's adoption decision, based partly on racial considerations, did not create a racial classification because it aimed only at determining what was best for the child. *Id.* "Thus, the equal protection clause of the constitution does not require 'strict scrutiny' of the trial judge's findings in an interracial adoption case." *Id.*

inciple, concluding that use of race in an adoption statute or judicial decision is inherently suspect, regardless of purpose or intent.⁵⁸ Some courts now recognize, therefore, that the presence of race as a factor in adoption proceedings requires strict scrutiny.⁵⁹

In re R.M.G. thus outlined a second approach for using race as a factor in adoption decisions.⁶⁰ To survive strict scrutiny, a statute or process first must serve a compelling government interest and, second, must be necessary or precisely tailored to serve that interest.⁶¹ The court determined that the child's best interest is a compelling interest because previous decisions had implicitly treated it as such.⁶² It then found that the use of race as a "mere factor" in adoption decisions is, given the right analytical framework, a precisely tailored, necessary means of achieving this compelling end.⁶³ Another court recently ap-

58. 454 A.2d 776, 786 (D.C. 1982) (citing *Bakke*, 438 U.S. at 291).

59. *Id.* at 786. The *In re R.M.G.* court also rejected the use of "middle-tier" scrutiny for benign racial classifications. *Id.* The court reasoned that the Supreme Court has never accepted the proposition that positive racial discrimination should receive less stringent intermediate scrutiny. *Id.* It then distinguished adoption from benign affirmative action programs and concluded that intermediate scrutiny is not "applicable in a family law context, where racial classifications over the years have resulted in particularly vivid examples of invidious discrimination." *Id.* The Supreme Court has determined that courts should apply strict scrutiny in that type of family law. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

Yet not all recent court decisions have accepted the view that strict scrutiny applies to adoption decisions. In *In re D.I.S.*, the court declined to follow its own *In re R.M.G.* precedent. See 494 A.2d 1316, 1327 (D.C. 1985). While *In re D.I.S.* demonstrates that the *Drummond* approach lives on, other courts have adopted the *In Re R.M.G.* formulation. See, e.g., *DeWees v. Stevenson*, 779 F. Supp. 25, 28 (E.D. Pa. 1991); *In re Moorehead*, 600 N.E.2d 778, 789 (Ohio Ct. App. 1991); see also Mark A. Hardin & Jane N. Feller, *Transracial Adoption: Courts Test Same-Race Placement Policies*, YOUTH L. NEWS, July-Aug. 1992, at 17-18 (reviewing recent holdings on the use of race as a factor in various court proceedings).

60. 454 A.2d at 786.

61. *DeWees*, 779 F. Supp. at 28; *In re R.M.G.*, 454 A.2d at 786; see also *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (outlining the strict scrutiny formula).

62. *In re R.M.G.*, 454 A.2d at 786. The Supreme Court seems to have drawn a similar conclusion in *Palmore*. The Court stated that the "[s]tate, of course, has a duty of the highest order to protect the interests of minor children." 466 U.S. 429, 433 (1984) (emphasis added). Although the Court did not use the "compelling" terminology, *Palmore* implies the child's best interest falls within this category. Perry, *supra* note 27, at 58 n.21. The Court concluded, however, that the judge's use of race in a custody dispute between parents does not properly serve this compelling state interest. *Palmore*, 466 U.S. at 433.

63. *In re R.M.G.*, 454 A.2d at 791. This strict scrutiny analysis parallels

plied similar reasoning in the analogous foster care area, stating "the goal of making an adequate long-term foster care placement that provides for a foster child's racial and cultural needs and that is consistent with the best interests of the child, is indisputably a compelling governmental interest for the purposes of the Equal Protection Clause."⁶⁴ Thus, while a court's use of race in adoption proceedings is inherently suspect, it does not offend the Constitution if properly considered as only one factor among others.

4. The Constitutionality of Race as a Weighted or Dominant Factor

No consensus has emerged on how trial judges should weigh race in adoption decisions and how much discretion the

Powell's justification of the use of racial factors to promote diversity at universities in *Bakke*. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313-15, 317-18 (1978) (Powell, J.).

The *In re R.M.G.* court further required trial judges to use a particular analytical framework to ensure precise tailoring. 454 A.2d at 791-92. First, the trial judge must determine the "effect of each family's race and related attitudes on the child's sense of belonging . . ." *Id.* Second, the judge should then compare the two families in light of these findings. *Id.* at 792. Finally, the judge must decide how significant these racial differences are when combined with all other relevant factors. *Id.* The trial judge must also clearly articulate this reasoning process. *Id.* at 791. By requiring each trial judge to utilize this analysis, the court ensures these judges will use race and other race-related factors properly in each adoption placement decision and also limited their judicial discretion. *Id.*

Other jurisdictions have accepted utilization of racial factors as necessary to serve a compelling state interest without adopting the entire *In re R.M.G.* formula. See, e.g., *McLaughlin*, 693 F. Supp at 324; *In re Moorehead*, 600 N.E.2d at 778. In *McLaughlin*, the court reasoned that use of race as the sole criterion in a long-term foster care plan is not an appropriate means of achieving the child's best interest. *McLaughlin*, 693 F. Supp. at 324. In this context, the judge must only critique the child's current (or former) white foster family on their ability to foster the child's "racial and cultural needs," along with other race-neutral considerations. *Id.* The *DeWees* court took an approach similar to *McLaughlin*, yet ultimately concluded that the trial court had properly considered race-related factors in removing a child from a white foster family. *DeWees*, 779 F. Supp. at 27-28.

64. *McLaughlin*, 693 F. Supp. at 324. The *McLaughlin* court went on to state that utilizing race as a factor is not necessary to serve the child's best interest in the narrow circumstance of deciding whether to allow a black child to remain with or be returned to a particular white foster family. *Id.* The court further stated that the judge must still consider the child's "racial and cultural needs." Other recent cases have not extended *McLaughlin's* limitation on use of racial factors to other areas of adoption and foster care. For example, the *In re Moorehead* court applied the *In re R.M.G.* approach to an adoption placement decision and stated race should be one factor in the placement inquiry. 600 N.E.2d at 788-89.

law should leave to judicial or administrative decision makers. Some courts have indicated that race must not be a highly influential or heavily weighted factor. In a 1983 adoption case, for example, the Pennsylvania Supreme Court stated that agencies and hearings tribunals may not "exaggerate" or "overemphasize" the importance of race.⁶⁵ In *In re R.M.G.*, the court ruled out a "presumptive preference" or "head start" in favor of one race.⁶⁶ The court further limited the impact of race by narrowing a trial judge's discretion through imposition of an analytical framework and by requiring "substantial" justification of the judge's conclusions.⁶⁷ Another appellate court refused to defer to the trial judge's findings on race, thereby reducing the scope of discretion and the potential for the strong influence of racial factors.⁶⁸ Race may not, the court stated, play a dominant role to the exclusion of other considerations.⁶⁹

Yet there is no constitutional requirement that courts afford race only equal or lesser weight than other factors.⁷⁰ An

65. *In re Davis*, 465 A.2d 614, 620, 628 (Pa. 1983). The court assumed that the role of race in adoption proceedings, while presently relevant, would gradually decline as racial prejudice and bias subside. *Id.* The court went on to caution that overreliance on race in adoption decisions could inadvertently reinforce societal prejudice. *Id.*

66. 454 A.2d 776, 787 (D.C. 1982).

67. *Id.* at 790-92. For a brief summary of the *In re R.M.G.* analytical framework, see *supra* note 63. Limiting judicial and agency discretion coincides with *In re R.M.G.*'s approach to the use of race because the requirement of "narrow tailoring" to serve a compelling state interest demands meticulous articulation of the court's decision-making process. The court stated:

[T]his court needs to understand exactly how the trial court made the judgment as to race that it did: whether as a precisely analyzed determination, based on carefully thought through comparisons of the parties drawn from record evidence, or as a more generalized conclusion that race always favors petitioners of the same race . . . a judgement reflecting an impermissible intellectual shortcut.

454 A.2d at 794. In effect, by strengthening the abuse of discretion criteria and outlining precise analytical steps the trial judge must follow, the court reduced the chance that race would play a significant, dominant or decisive role. *Id.* at 790.

68. *In re Moorehead*, 600 N.E.2d 778, 788 (Ohio Ct. App. 1991). As in *In re R.M.G.*, by reducing the scope of discretion the appellate court limits the trial court's opportunity to draw conclusions based more substantially on racial findings and criteria. See *id.* The appellate court then can more easily scrutinize the trial judge's reasoning to determine whether there has been an abuse of discretion. See *id.* at 786.

69. *Id.*; see also Barthelet, *supra* note 2, at 1248 (concluding courts should give no significant preference to same-race adoption), 1226-27 (arguing current adoption policies emphasizing race conflict with basic equal protection principles).

70. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978) (Powell, J.). In discussing use of race as a permissible factor in university ad-

early Ohio court decision suggested a dominant role for race by establishing that same-race adoption placements should occur under "ordinary circumstances."⁷¹ The Fifth Circuit made a similar assertion in *Drummond*, stating that race may play a "decisive" role provided that courts not utilize it in an automatic fashion.⁷² Even the *In re R.M.G.* court left the door open for weighted racial factors, articulating an analytical framework that allows race to play a significant, perhaps dominant role in adoption decisions.⁷³ Finally, the law has historically given trial judges broad discretion to determine a child's best interest.⁷⁴ This wide discretion grants judges and administra-

missions policies, Justice Powell stated that "the *weight* attributed to a particular quality may *vary* from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Id.* (emphasis added). Such variances are acceptable under the Fourteenth Amendment provided the school has weighed them "fairly and competitively." *Id.* Implicitly then, a weighted, or perhaps dominant or presumptive preference based on race is constitutional provided the state applies it on an individualized basis. *See id.* at 319 n.53 (universities may use race as a factor if they balance the factors on an "individualized, case-by-case basis").

71. *In re Adoption of Baker*, 185 N.E.2d 51, 53 (Ohio Ct. App. 1962) ("Under ordinary circumstances a child should be placed in a family having the same racial, religious and cultural backgrounds . . .").

72. *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977), *cert denied*, 437 U.S. 910 (1978). The court boldly stated that the importance of race should not be underestimated: "A couple has no right to adopt a child it is not equipped to rear, and according to the professional literature race bears directly on that inquiry." *Id.* The court's restrictions on the use of race do not limit its weight. As long as race is not an automatically determinative factor, "the use of race as one of the factors in making the ultimate decision is legitimate." *Id.*; *see also* *J.H.H. v. O'Hara*, 878 F.2d 240, 242 (8th Cir. 1989), *cert denied*, 493 U.S. 1072 (1990) (upholding a foster care decision even though race was a primary consideration in the placement plan). *But see* Marilyn Yarbrough, *Transracial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353, 362 (1988) (arguing race should be a determining factor only when there are two equally qualified couples and the child's best interest is completely satisfied).

73. 454 A.2d 776, 792 (D.C. 1982). Pursuant to its analytical framework, the court weighed "how significant the racial differences are when all relevant factors are taken together. . . ." *Id.* This formula clearly indicates race will be given different weight in different situations. The court further asserted that race could have a determinative impact if the differences in race (and racial attitudes) of the parent and adoptive child would negatively impact the child's developing sense of identity. *Id.*

74. Even though *In re R.M.G.* and *In re Moorehead* move to limit deference to, and the discretion of, trial judges and administrators, lower court and administrative decisionmakers have historically had broad discretion in the area of adoption and foster care. *See* Perry, *supra* note 27 at 80-82 (stating appellate courts grant trial judges great deference in adoption proceedings by allowing them to take a case-by-case approach). In *Drummond*, the court, at least in theory, allowed deference to adoption agency findings that racial char-

tors in most jurisdictions flexibility in their emphasis of race in consideration with other factors.

Thus, while courts across the country agree on the outer limits of racial considerations in adoption cases, they have not established a standard framework for determining what role race can play within those limitations. Nor has any single court taken on the complex task of defining the constitutional issues raised by the balancing process that determines which adoptive or foster family will best serve a child's interest.⁷⁵ As a result, the constitutional implications of a judge, or administrator's use of race as a factor in any given adoption inquiry remain unsettled.

II. A CONSTITUTIONAL ANALYSIS OF RACE-MATCHING IN MINNESOTA

Minnesota is one of a number of states that has legislated a statutory provision requiring preference for same-race adoptions.⁷⁶ It is difficult to determine the constitutionality of this measure. The law's language, along with the language of related rules and policies, lacks detail. In addition, statistics on adoptions in Minnesota do not demonstrate how courts are interpreting and applying the statute. Thus, neither the wording nor statewide application of the statute indicate whether it is consistent with equal protection principles. Ultimately then, any determination of the constitutionality of courts' application of this race-matching statute requires a critique on a case-by-case basis.

A. THE CONSTITUTIONALITY OF THE MINNESOTA STATUTE

1. The Language of the Preference

Minnesota's same-race preference statute is not unconstitutional on its face.⁷⁷ While the term "preference" is vague, it clearly does not impose a strict ban on transracial adoption.⁷⁸

acteristics must be a consideration because duplication of the child's natural biological environment is important. 563 F.2d at 1206.

75. *In re R.M.G.* laid out an analytical framework for consideration of race factors, see 454 A.2d at 791-92, but did not specifically define how much weight can be given to racial differences.

76. See MINN. STAT. § 259.28, subd. 2 (1992); see also Bartholet, *supra* note 2, at 1189 (discussing state laws requiring courts to consider race in adoption proceedings).

77. For a discussion of facially void race-matching statutes, see *supra* notes 34-35 and accompanying text.

78. The Minnesota statute creates a preference, not a ban like those

The ordering of the preferences within the statute implies some weighting, yet the language in no way indicates race is an absolute, independently decisive factor, or should always outweigh all other considerations.⁷⁹ In addition, this "preference" alone does not offend the ban on "presumptive preferences" or a "head start" articulated in *In re R.M.G.*⁸⁰ The statute does not necessarily create a presumption that a petitioner must affirmatively overcome.⁸¹ Rather, the racial preference may merely function as a "plus" to one race, as a way to "tip the scales" or as a mere factor, all permissible uses of race affirmed throughout adoption jurisprudence and even in *In re R.M.G.*

2. The Application of the Preference

The language of this provision alone does not guarantee survival under the Fourteenth Amendment, however. Because the statute provides no concrete guidance, its application remains unclear. If agencies and courts use the same-race preference as more than a factor, in a manner that "stigmatizes" a certain race rather than serving adoptive children's best interests, the law violates the *Drummond* principle.⁸² If the particular use of the preference is not necessary to serve the compelling interest of providing for the child's welfare, the statute fails the *In re R.M.G.* test.⁸³ Thus, the constitutional analysis must move beyond the statutory language and focus

struck down in the *In re Gomez* line of cases. See *supra* notes 34-38 and accompanying text for a discussion of bans on interracial adoption.

79. The statute lists race second after a preference for the child's "relatives." MINN. STAT. § 259.28, subd. 2 (1992). In addition, there is no indication in the text that race will necessarily outweigh all other factors besides the relatives preference. *Id.* For a discussion of the impermissibility of allowing racial considerations outweigh all others, see *supra* notes 39-43 and accompanying text.

80. 454 A.2d 776, 787-88 (D.C. 1982).

81. The statute's language indicates that, unless there is "good cause" to the contrary, a court shall consider the relatives and racial preferences. MINN. STAT. § 259.28, subd. 2 (1992). The "good cause" provision refers only to the granting of a preference and the statute does not define "preference." See *id.* The statute does not specify that the preferred party automatically will get custody unless the non-preferred party overcomes some hurdle. It merely says one party will receive a preference in the overall best interest calculus. See *id.* Such a preference does not offend *In re R.M.G.*; that court merely banned race used in an automatic or presumptive manner "without regard to evidence—for or against cross-racial adoption." 454 A.2d at 787.

82. See *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

83. See 454 A.2d at 786.

upon the law's application.⁸⁴

Subsidiary state rules and policies designed for the administration of the statute lend little guidance here.⁸⁵ These procedures and rules do not specify the way in which agencies and courts are to utilize the preference. In fact, most of the guidelines merely adopt the statute's ambiguous language.⁸⁶ While these provisions do not dictate an unconstitutional application, neither do they demonstrate those implementing the statute do so constitutionally.⁸⁷

The most recent statistical survey of adoptions in Minnesota sheds some light on the implementation of these provisions. A Department of Human Services study indicates that in 1989 children's race did not always determine their placement.⁸⁸ For example, of forty-one Minnesota-born black and Hispanic children not adopted by relatives, persons of a different race adopted twenty-four.⁸⁹ Clearly, then, the same-race preference statute has not created an insurmountable, and thus unconstitutional, barrier to transracial adoption within the state.

Still, this study alone does not resolve the issue of the stat-

84. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by a public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

85. See, e.g., MINN. R. 9560.0040, subp. 2 (1992). This rule merely states that minorities are considered "special needs" children for placement purposes and agencies should follow the statutory preference in their placement practices. *Id.* Neither of these statements details how race is actually to effect the placement calculus.

86. See, e.g., ADOPTION HANDBOOK, *supra* note 22, at 1-2.

87. MINN. STAT. § 259.455 and coordinate MINN R. 9560.0040, subp. 3, requiring agencies to attempt to recruit families of the child's same racial and ethnic heritage, are not unconstitutional, provided these provisions create no delays or waiting periods for certain children. See, e.g., Bartholet, *supra* note 2, at 1246 (concluding that while race is relevant, no significant delay in the adoption of minority children is permissible).

88. MINNESOTA DEP'T OF HUMAN SERVS., ADOPTION ANNUAL SUMMARY 9-12 (1989) (on file with the Department of Human Services) [hereinafter ADOPTION SUMMARY]. This is DHS's most recent comprehensive study of adoption decrees in the state. Interview with Robert Denardo, Supervisor, DHS Family and Children's Services Division, St. Paul, Minn. (Nov. 2, 1992).

89. ADOPTION SUMMARY, *supra* note 88, at 9. The survey also contains Native American child placements, but these decrees are not discussed here because of the different issues presented by the federal Indian Child Welfare Act, 25 U.S.C. § 1901-1963 (1982).

ute's constitutionality. The figures do not indicate the number of adoption denials and the reasons behind them.⁹⁰ The study also lacks data on the number of children left unadopted and waiting in foster care, and information concerning the existence of race-based discrepancies in these areas.⁹¹ The study's small sample and one-year time span limit its value in this inquiry.⁹² Finally, such information is inherently inadequate because it does not outline the use of race in each adoption proceeding and consequently leaves constitutional questions unanswered.

The constitutionality of the Minnesota same-race adoption preference therefore remains in question. Because the language of the statute, coordinate rules, and policies lack detail, it is difficult to assess their application in adoption proceedings. This ambiguity itself poses possible constitutional problems. The danger that trial judges, working without a set framework, may misapply the preference might indicate the state has not narrowly tailored the statute to serve the best interest of the child as *In re R.M.G.* requires.⁹³ Because the statutory and administrative language affords no guidance, agencies and courts may have mishandled the preference and afforded race too much weight in individual adoption decisions.⁹⁴ This potential for misuse jeopardizes the Act because all adoptive children have a right to a hearing wherein the court gives proper consideration to their best interest.⁹⁵

B. A PROPOSED ANALYTICAL FRAMEWORK

Ambiguity and the danger of misapplication threaten the constitutionality of the Minnesota same-race preference statute. To ensure proper application of the Act, each trial judge must

90. The survey covers only adoption "decrees." ADOPTION SUMMARY, *supra* note 88, at 9-12. Rejected petitions do not appear.

91. *Id.* These omissions limit the survey's value because the data do not indicate whether minority children are prevented from moving through the adoption process to the decree stage. Many eligible minorities may be left in long-term foster care. Nationwide, 60% of children in foster care are minorities. Angela McCormick, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303, 304 (1990).

92. A one-year tabulation of adoption decrees is a very small sample. A more thorough and lengthy investigation of applications, decrees and final adoption decisions is necessary for accurate data analysis.

93. See, e.g., *In re D.I.S.*, 494 A.2d 1316, 1325 (D.C. 1985) ("each case must be dealt with on its own terms").

94. Because courts and agencies make adoption decisions with little statutory and judicial guidance, the likelihood of misuse is high.

95. See *In re D.L.*, 486 N.W.2d 375, 379 (Minn.), *cert. denied*, 113 S. Ct. 603 (1992).

analyze the race factor in compliance with the Constitution.⁹⁶ The following three-part framework would guide trial courts through the process of utilizing a same-race preference in adoption proceedings. This approach aligns the use of race with the principles of both *Drummond* and *In re R.M.G.* Through this process, the preference will not only serve the best interest of the child, but will also comply with the Constitution.

1. The Threshold Determination

The trial judge should first answer a threshold question: would this court consider the petitioning family for adoption of the child if race were not an issue?⁹⁷ If the answer is "yes", the court should automatically move on to the next level of inquiry.⁹⁸

This threshold determination serves three purposes. It requires courts to establish a race-neutral minimum standard for all potential adoptive families. This prevents the creation of a two-tiered system and eliminates the possibility of an up-front, absolute bar to interracial adoption.⁹⁹ In addition, this initial

96. Ideally, Minnesota should amend the preference statute, establishing some kind of defined formula. In the absence of an amendment, however, a judicially designed, constitutionally mandated formula should be developed to guide trial judges. In *In re D.L.*, the Minnesota Supreme Court declared that courts may go beyond the statutes to protect the child's best interest. *Id.* A court, complying substantially with a statute is not "relegated to a passive role in adoption issues." *Id.* On the contrary, "it is well established in this state that the courts have independent authority to determine a child's 'best interest.'" *Id.*

97. Another way to articulate this standard is as a "but for" test: but for race, would the court or agency consider the family/families for adoption of the child? This threshold is similar to the first step in McCormick's proposal. See McCormick, *supra* note 91, at 315-16. She uses a "but for" test, however, to determine what role race has played in an adoption decision. *Id.* The approach presented here is different: the "but for" test should be the first step in determining whether a family meets basic qualifications for an adoption placement.

Establishing "basic qualifications" is necessary. Courts and agencies setting these standards, however, must avoid a bias towards white, middle-class families. Biased criteria have traditionally denied minority families access to the adoption system. See Howard, *supra* note 2, at 514. Requirements must be socially and culturally flexible, "without compromising what is considered essential for all children." CWLA STANDARDS, *supra* note 19, at 6.

98. If the answer is "no," the family is not qualified to adopt anyway, so race assumes no role in the rejection of their petition at this early stage.

99. Two-tiered systems, which send a child of one race through one adoption process and a child of another race through another, use race in an automatic fashion and are therefore unconstitutional. See Bartholet, *supra* note 2, at 1193-95, 1237. This first-step test helps prevent a two-tiered approach by re-

finding prevents a judge from applying the statute in a manner that imposes the presumptive hurdles deemed impermissible in *In re R.M.G.*¹⁰⁰ When two families petition for the same child, the judge should move to the next analytical level before considering their races, thus ruling out an inappropriate early denial or head start. Finally, a family denied a request for consideration to adopt a child of a different race can use this step to challenge the denying agency.¹⁰¹ If the family meets the basic qualifications required to adopt a child, and children are available, a court must at least move to the second and third levels of inquiry before rejecting its petition.¹⁰² This reduces the risk of a *de facto* agency restriction on transracial adoption by allowing families to bring suit demanding fair individual consideration.¹⁰³

2. Applying the Balancing Test

Following this threshold determination, the trial judge should next balance all relevant factors to determine the best interest of the child.¹⁰⁴ The use of race in this balancing pro-

quiring all families, regardless of race, to meet whatever minimum threshold the courts or legislature chose to adopt.

100. See 454 A.2d 776, 787 (D.C. 1982). A race-neutral first step prevents the courts from requiring one family to meet a greater initial burden prior to balancing the child's interests.

101. For example, if a white foster family cares for a black child who is eligible for adoption, the family may bring an action in court if the agency stalls or unduly delays consideration of their adoption request. If the family passes this first inquiry, the court must automatically move on to determine if adoption by the family will serve the child's best interest.

102. This does not imply that all families can rush to court without going through normal agency procedures. Rather, families who believe agencies have denied them initial access to available children because of race have a tool for challenging the agency in court. Again, this prevents the use of separate criteria and timelines for adoptive children of different races.

103. Agency policies that strictly enforce race-matching are often unwritten and invisible, but nevertheless common. See Bartholet, *supra* note 2, at 1186 (explaining how agency race-matching policies operate in the "real world").

104. The best interest balancing analysis begins at this point. For a discussion of the traditional best interest analysis, see *supra* notes 23-27 and accompanying text. Most states take certain factors such as home environment stability, financial status, lifestyle and health into account when determining whether a family will promote a child's welfare. Blackwood, *supra* note 25, at 213-15. The Minnesota Department of Human Services lists other factors counselors should consider when assessing the suitability of the petitioning family. These include the family's motivation and readiness to adopt; experiences and culture; parenting skills, philosophy and background; values and preferences; and communication skills and personality traits. ADOPTION HANDBOOK, *supra* note 22, at 36-37.

cess depends on whether there are two families petitioning for the child or merely one. If two families, one of the child's race and one of a different race, are competing for the same child, the court may use "race-in-itself" as one factor in determining which choice would better promote the child's welfare.¹⁰⁵ In addition, the court may consider race-related factors, such as whether the family of a different race is sensitive to the child's racial and cultural needs.¹⁰⁶ In this balancing, the court may utilize race-in-itself and race-related factors as weighted, even dominant, considerations. The role of race will depend on the particular circumstances and the quality of and interrelationships between these and other relevant factors.¹⁰⁷ This step allows the trial judge to integrate the same-race preference into the overall best interest calculus.¹⁰⁸

If only one family petitions for a child of a different race, however, the judge may not use race-in-itself as a factor.¹⁰⁹ In

105. "Race-in-itself" refers to genetic racial differences or similarities. For example, if a black family and a white family petition to adopt a black child, the fact that the black family is the same race as the child may be one factor in their favor. The *Drummond* and *In re R.M.G.* lines of precedent demonstrate that courts may use race-in-itself as a relevant factor in determining the child's best interest in these circumstances.

106. Race-related considerations may include the family's understanding of the child's racial background and heritage, its willingness to help the child learn about this heritage and its ability to contact, communicate and associate with members of the child's race or ethnic group. See *supra* note 63 (outlining the *In re R.M.G.* framework which takes similar types of race-related factors into account).

107. The question of how large a role race may permissibly play is not settled. See *supra* notes 65-74 and accompanying text. Within the analytical confines presented here, however, courts should not use race as a presumption or an absolutely determinative factor but should consider it among other relevant factors. See discussion of proposed step one, *supra* note 101 and accompanying text. The substantial justification required by proposed step three, *infra* notes 115-19 and accompanying text, also will limit trial judges' discretion to "over-emphasize" or improperly consider race. This framework, then, screens out the problematic kinds of race-weighting outlined *supra* notes 65-69 and accompanying text.

In addition to this protection, a court's use of race as a weighted or dominant factor conforms to the holding in many cases that courts need not afford race only equal or lesser consideration than other factors. See, e.g., *In re Adoption of Baker*, 185 N.E.2d 51, 53 (Ohio Ct. App. 1962). Therefore, the use of race as a dominant factor in this context is neither prohibited nor problematic. Courts may give race considerable weight in this balancing test if necessary to serve the best interest of the child.

108. The weight given to race will vary depending on its impact on the child's welfare. See *Hardin & Feller*, *supra* note 59, at 17.

109. See, e.g., *DeWees v. Stevenson*, 779 F. Supp. 25, 28 (E.D. Pa. 1991); *McLaughlin v. Pernsley*, 673 F. Supp. 318, 324 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3rd Cir. 1989). The *DeWees* court upheld the denial of a foster care family's

this situation, a racial preference plays no role because there is no other family of a different race to "prefer."¹¹⁰ A court would most likely use race in this context as a stigmatizing classification and not as a precisely tailored means for achieving the best interest of the child.¹¹¹ Thus, the principles of adoption jurisprudence demonstrate that a court should not use race-in-itself under these circumstances.

Other race-related considerations are still relevant when only one family is petitioning for the child, as long as the court does not use these factors in a per se manner. For example, the court should consider whether the family is aware of, and sensitive to, the child's racial heritage and cultural needs.¹¹² The court should also evaluate external factors, such as whether the adoptive family's community and schools will isolate the child or allow contact and communication with others of her race or heritage.¹¹³ These "special needs" of the child do not, by definition, stigmatize families of a different race.¹¹⁴ In addition, con-

adoption request when the agency considered parents' racial attitudes as a factor in the best interest balancing. 779 F. Supp. at 28. The court was concerned that the agency avoid the appearance that it had based its adoption decision on race. *Id.* at 29. The *McLaughlin* court struck down the use of race as a sole criterion and also refused to allow consideration of race in the particular circumstance of reviewing whether a judge should have removed a black child from its original white foster family. 693 F. Supp. at 324. *DeWees* also appears limited to the specific factual situation of a single family seeking to adopt a child of a different race. Contrary to Hardin's and Feller's view that *DeWees* ruled out the use of race-in-itself in all circumstances, see Hardin & Feller, *supra* note 59, at 18, the court limited its decision by accepting *Drummond's* use of "race and racial attitudes" as a general principle. *DeWees*, 779 F. Supp. at 28. For further discussion of *McLaughlin* and *DeWees* see *supra* notes 62-63.

110. See MINN. STAT. § 259.28, subd. 2 (1992). The statute clearly articulates preferences, not prerequisites. Thus, when only one family petitions, there is no other family to compare to them or to "prefer." "Substantial compliance" with the statute is preserved if a trial judge does not utilize race-in-itself as a factor in this situation. See *In re Jordet*, 80 N.W.2d 642, 646 (Minn. 1957).

111. A trial judge will most likely use race-in-itself in this context to deny the petition, perhaps assuming that a same-race family will be found for the child in the near future. Such action would create a constitutionally invalid two-tier system that stigmatizes the family and makes race the sole determinative factor. See, e.g., *In re Moorehead*, 600 N.E.2d 778, 787 (Ohio Ct. App. 1991).

112. See *DeWees*, 779 F. Supp. at 29; *McLaughlin*, 693 F. Supp. at 324 (foster care).

113. See, e.g., LADNER, *supra* note 1, at 110 (illustrating the damage to a minority child's identity and understanding isolation in all-white communities can cause).

114. These psychological and cultural factors directly impact the child's well-being and do not impose the dangers of considerations of race-in-itself dis-

sideration of these important psychological, emotional, and cultural factors is necessary to decide how to serve a child's best interest. Thus, while the trial judge may not use race-in-itself in this context, issues of special needs tied to race are permissible factors for courts to balance in the calculus.

3. Recording and Justifying the Decision

Once a judge completes the balancing process and makes a decision she should, as a final step, record and articulate her balancing analysis to affirmatively demonstrate racial considerations have not *clearly outweighed all other factors*.¹¹⁵ In determining the best interest of a child, the court has broad discretion, even in the use of permissible racial factors.¹¹⁶ Constitutional considerations limit this discretion, however.¹¹⁷ Both the *Drummond* and *In re R.M.G.* lines of cases limit the role of racial factors to something less than absolute or solely decisive.¹¹⁸ Thus, although race may tip the scales, be an "equal" among other factors, or even dominate in certain contexts, it may never "clearly outweigh all other considerations."¹¹⁹ A judge cannot cross this constitutional threshold—to do so is an abuse of discretion.

This third step serves several interrelated purposes. It illustrates and objectifies a trial judge's reasoning in an area where clarity, although crucial, is often lost in the complex web

cussed *supra* at note 111. In addition, by including these considerations, the trial judge conforms to, and makes permissible, the "special needs" requirements of MINN. R. 9560.0040 (1992).

115. Minnesota law already requires trial judges to make detailed findings to demonstrate their decisions serve the children's best interests. *In re D.L.*, 486 N.W.2d 375, 380 (Minn.), *cert. denied*, 113 S. Ct. 603 (1992). The proposed third step's function extends farther, however, and requires a judge to specifically articulate how she used racial factors. This requirement would conform the use of race in Minnesota adoption proceedings to *In re R.M.G.*'s "precise tailoring" requirement. *In re R.M.G.*, 454 A.2d 776, 791 (D.C. 1982).

116. *See In re Jordet*, 80 N.W.2d 642, 646 (Minn. 1957).

117. Clearly, a trial court abuses its discretion when it crosses a constitutional boundary. *See, e.g., In re Moorehead*, 600 N.E.2d 778, 780 (Ohio Ct. App. 1991).

118. *See, e.g., Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1204-05 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978); *In re R.M.G.*, 454 A.2d 776, 791 (D.C. 1982).

119. The phrase "clearly outweigh all other factors" draws a concise constitutional limit to the weight accorded racial considerations. This limit conforms to the various standards courts have set forth. *See, e.g., Drummond*, 563 F.2d at 1204-05; *In re R.M.G.*, 454 A.2d at 791.

of factors contained in the calculus.¹²⁰ In addition, while preserving ample judicial flexibility, it sets a clear demarcation line for appellate review.¹²¹ The court's articulation also rules out deference to agency conclusions. The court must make its own findings.¹²² Finally, this affirmative demonstration ensures that the court truly serves the child's best interest, rather than some other hidden agenda, policy, or interest.¹²³ Nonetheless, the court achieves all of these ends while maintaining substantial compliance with Minnesota law.¹²⁴

4. The Importance of the Proposed Framework

This three-part analytical framework not only provides a means for proper consideration of race in a single case, but also could save the Minnesota same-race preference statute itself. The danger of misapplication and abuse of this ambiguous law could cause courts to deem it unconstitutional. The foregoing formula is necessary, absent a legislated amendment, to preserve the Act's permissible purposes while solidifying its constitutionality.

This framework also serves the equally important function of furthering the best interests of adoptive children by allowing trial judges the flexibility to consider all relevant factors, while reducing the chances for overemphasis of racial considerations. This type of analytical methodology is necessary. The ambiguity, confusion, and controversy in the law may adversely affect

120. See, e.g., Schwartz, *supra* note 25, at 171-72 (arguing the best interests standard and its application are vague, speculative and indeterminate).

121. The appellate court must have a clear threshold for determining what is constitutional. This bright line, along with the requirement of detailed findings, will allow the appellate court to determine whether "the evaluation of race was precisely tailored to the best interest of the child." *In re R.M.G.*, 454 A.2d at 794. Further, this threshold signals where proper discretion ends and abuse begins. Thus, though the trial court retains substantial discretion, the threshold reduces ambiguity and confusion. This new approach conforms to precedent while addressing the concerns about too much trial court discretion. See Howard, *supra* note 2, at 529-30 ("Yet the best interests test does not impose any limitation. It is notoriously vague. . .").

122. For a case in which a trial court abused its discretion by deferring to a racially based agency determination, see *In re Moorehead*, 600 N.E.2d 778, 780 (Ohio Ct. App. 1991). Courts must not defer to agency policies that violate the principles of the Constitution. *Id.*

123. See Howard, *supra* note 2, at 527-33 (discussing the interests besides those of the child that tend to invade the balancing calculus).

124. Courts will thus apply the Minnesota racial preference in accordance with both the Constitution and the child's best interest.

judges' reasoning and victimize adoptive children and petitioning families.

CONCLUSION

Although state legislatures create adoption laws and agencies administer them, courts have the last word on adoption placements. The judiciary's fundamental concern in choosing, affirming, or denying an adoption must always be the best interest of the child. In light of the controversy surrounding race and adoption, these decision makers bear a heavy burden of staying within the confines of the Constitution and serving the child's welfare. For this reason, courts continue to struggle with how to treat race in adoption decisions. The importance of this issue, however, demands that the judiciary finally clarify and then follow constitutional standards; such standards determine how thousands of children a year will live the rest of their lives.

The proposed analytical framework would help courts implement the Minnesota same-race preference statute in a manner consistent with constitutional principles. Because the statute provides few specifics, however, this methodology outlines constitutional limits which courts can apply "generically" to adoption laws and policies containing preference provisions. Within this structure, defined steps provide the guidance and clarity and allow the discretion necessary for judges to utilize racial factors in accordance with the needs of a particular case. This framework allows a same-race preference statute or policy to serve the best interest of the child by permitting race to be a factor, while ensuring it is neither misused nor abused.